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From Moral Intuition to Political Change: On Joseph Carens' Theory of Social Membership and Open Borders

Joseph Carens' book is much more than a summary of the arguments he has developed over the course of several decades. Unlike most contemporary political theory, this book aims to do what the great books in the history of political thought did: rather than talking only to fellow academic philosophers it talks to fellow citizens and tries to convince them that widespread moral intuitions commit them to quite radical critiques of current institutions and policies.

Carens' didactic method of "political theory from the ground up" (p. 9) is as important as, and intimately related to, the substance of his argument. It is a practical demonstration that reflective equilibrium on deeply contested issues of public policy cannot be achieved by the philosopher testing logical implications of her favourite principles against moral intuitions gained from her own – mostly very limited – practical experience. Instead, the theorist must imagine how she would make her case in a conversation with citizens who have a voice in democratic politics.

The initial chapters of the book open therefore with stories about actual cases of immigrants who have been denied the status and rights that Carens thinks they are entitled to rather than with statements of general principles or hypothetical Jack and Jill cases constructed by armchair philosophers to test these. And instead of starting with his most contested argument – his defence of open borders – Carens attempts to drag readers first into a the widest circle of moral consensus in order to persuade them subsequently that the same moral principles that inform broadly shared intuitions have strong implications for questions over which moral consensus breaks down. The book starts for this reason with what most readers will consider the least contentious claim – access for the children of immigrants to citizenship at birth – and moves then step by step to more controversial issues – a right to naturalisation, inclusion beyond and before citizenship, rights of temporary and irregular migrants. Admission claims of ordinary migrants and refugees and the legitimacy of immigration control are only addressed in the second part of the book.

I find these features of Carens' approach refreshing and entirely convincing. But I have doubts about another aspect of his method that I find somewhat at odds with his general style of reasoning. In the first part of the book Carens accepts, *for the sake of the argument*, the "conventional assumption" that states are entitled to control immigration, whereas he openly challenges this assumption in part two. This is a common rhetorical device in both political theory and actual political deliberation. It is like saying to a theory opponent: "if we disagree on some fundamental issue, let's see whether we can still agree on others", or to a political one: "let's adopt now the reforms that we can agree on while postponing those on which we disagree". The problem is that dividing the issues in this way diminishes the potential value of Carens' gradualist and persuasive method. Disagreement on free movement becomes then too quickly a self-fulfilling prophecy and the case for open borders is no longer made by invoking the real world principles and arguments that underlie the first part of the book.

Carens dualistic strategy leads to conflicting assessments. While he starts with a defence of citizenship attribution by birth based on descent and birthplace as a proxy for future social membership of migrants' children, chapter 11 reasserts from a perspective of global justice his much-quoted 1987 critique of birthright as "the modern equivalent of feudal class privilege" (p. 226). Carens tries to resolve the contradiction by claiming that in an ideal world of open borders states would still use birthright and naturalisation in order to distinguish citizens from temporary migrants and visitors (p. 289). But the

question ought to be put also the other way round: what does his global justice argument imply for the legitimacy of birthright citizenship in the real world, here and now? Carens answers: "The goal of the open borders argument is to challenge complacency, to make us aware of how routine democratic practices in immigration deny freedom and help to maintain unjust inequality" (296). I find this unhelpful. If Carens had been faithful to the general method and spirit of his book, he would have searched for ways of bridging his social membership and open border arguments. What he does instead is using the second in order to generate some moral discomfort about the first, which risks, however, undermining it. Bridging the two arguments would have required him to examine as thoroughly real world contexts in which free international movement has been or could be expanded as he does with trends towards more inclusive rules for the acquisition of citizenship and more expansive rights for residents (p. 295). In other words, while the general method of his book would commit him to look for *pathways* towards open borders, Carens merely upholds the *ideal* of open borders as a moral standard without saying much how it could ever be achieved or approximated.

Connecting his two arguments from a real world perspective would also have implications for the first part of the book. Just as John Rawls' "closed society" assumption for the domestic part of his theory of justice made it difficult for him to take migration adequately into account in his theory of international justice, so Joseph Carens' initial setting aside of how states actually regulate international migration makes it harder from him to integrate free movement claims into his theory when discussing global justice.

A second reason why Carens' arguments about immigrant integration and open borders cannot be convincingly connected has to do with the criterion of social membership that he uses in the first part of the book to support immigrants' claims to equal status, rights and opportunities in receiving states. Social membership is not well-suited to serve as a bridge towards the open border argument for reasons that I will explain below. If I am right, then Carens' agenda of combining immigrant integration claims with free movement goals could be better promoted by basing both types of claims on citizenship arguments instead of grounding the first in social membership and the latter in human rights.

Social membership and birthright citizenship

The general idea underlying the argument in part I of the book is "that living within the territorial boundaries of a state makes one a member of society, that this social membership gives rise to moral claims in relation to the political community, and that these claims deepen over time" (158). There are two critical moves in Carens' argument that can be challenged. The first is from the social lifeworlds of individuals to membership in society, the second from social membership to membership in the political community.

Although this is not clear from Carens' account whether he considers social membership as a fact or a normative claim, I think it is essentially the latter. We can understand membership in essentially two ways: as participation in networks of social relations that link individuals with each other, or as a status within an association that has a set of rules for membership determination. Migrants are involved in multiple social networks, some of which are local, while others are transnational. These are social memberships that can be measured using sociological methods. Membership in a society at the national level, however, is not a concept with any obvious empirical content. Unlike states, macro level societies are not clearly bounded and do not have rules for membership admission. So Carens' claim should be understood as a normative one: Migrants who have lived for some time in a state *should* be recognized by other citizens and residents as members of a wider society in the sense that their presence is acknowledged, that they are not discriminated against, that their languages and religious practices are respected, etc. In Carens' words, they

should be accepted as “belonging”. This is a claim addressed to civil society more than to the state and it does not have to rely on any formal criterion of membership.

The first move in Carens’ argument is thus one from social facts (about spatial presence, time and social relations) to social norms (recognition of belonging), and also a move from small scale (social networks and lifeworlds) to large scale (national society). Yet it makes perfect sense from a liberal perspective. The second step seems a smaller one and rather obvious: Carens proposes a link between two normative claims to membership that operate at the same scale: migrants who ought to be recognized as members of society also ought to be given access to citizenship in the political community.

Since Carens defines the relevant society in which immigrants become members as the long-term residents of a state territory, it is easy to see why liberal states have duties towards immigrants that are analogous to those of civil society: liberal states must treat all long-term residents in their jurisdiction with equal respect and concern. Carens’ arguments in chapter 4 to 7 can be solidly grounded in such duties of liberal states towards all residents. But this is not yet sufficient to support a claim to membership in the political community. Why should liberal states have to offer immigrants access to citizenship on top of the protection and opportunities they enjoy as residents?

To answer this question we need a conception of political community rather than of society. Carens refers therefore at this point to democratic legitimacy: “[E]veryone should be able to participate in shaping the laws by which she is governed and in choosing the representatives who actually make the laws...” (p. 50). This principle of inclusion of all who are subject to coercive government has been widely endorsed by political theorists who have struggled with the “boundaries of the demos problem”,¹ but it raises a number of empirical puzzles once we consider the citizenship policies of all current democratic states. Why do immigrants have to apply for naturalisation before they can participate in shaping the laws? Wouldn’t the principle suggest that they should become citizens automatically after some time of residence and by virtue of their social membership?² And why can emigrants retain their citizenship after taking up long-term residence abroad and can even cast absentee votes in most democratic elections? Wouldn’t the principle of democratic legitimacy imply that those who are no longer governed by (most of) the laws, should not be able to participate in shaping them? Both questions combine to a basic one: Why do liberal democracies attribute citizenship at birth and allow people to retain it for life independently of where they reside, instead of simply turning into citizens all long-term residents and denationalizing and disenfranchising those who settle abroad?

Carens justifies birthright attribution as an indicator for a baby’s future social membership (p. 24) and emigrants’ right to retain a citizenship of origin by their interests in return options, in absentee rights to property and family life, and in recognition of their identities of origin (p. 54). Yet these seem somewhat ad hoc adjustments of his conception of social membership that also do not diminish the discrepancy with a principle of democratic legitimacy that grounds inclusion claims in subjection to coercion rather expectations about the future or affected interests.

I think the better answer is that birthright and life-long membership are not accidental features of current citizenship regimes but constitutive ones that are indicative for the nature of political community at the level of states – including liberal democratic ones. These features cannot be normatively evaluated by considering how well they fulfill a principle of including into the political community all members of society

¹ For a recent overview and critique of the debate see (Song 2012),

² As proposed by Rubio-Marín (2000) and subsequently also endorsed by Carens (2005).

or all governed by the law because birthright determines what a state-based political community is in the first place: an intergenerational association of individuals with a claim to collective self-government. When liberal states are exposed to immigration or emigration, they need to adjust their membership policies. But whatever adjustment they make preserves rather than undermines the basic principle of birthright. By introducing *ius soli* where there had previously only been *ius sanguinis*, several European states have adjusted their birthright regimes in a way that includes second and third generations of immigrant descent. By creating naturalisation entitlements, liberal states diminish the discrepancy between the resident population and those who are represented in government, but a naturalisation offer still allows immigrants to exclude themselves from the polity and affirms a difference between native citizens and newcomers. By tolerating dual citizenship, they facilitate the inclusion of first generation immigrants but retain at the same time links to emigrant citizens that are not broken if these take up residence and citizenship abroad.

Of course the institution of birthright is not beyond normative justification or critique. But such evaluation would have to address its purposes. From a perspective of governmentality, birthright can be seen as a particularly simple and efficient way of classifying populations into nationals and foreigners. From a democratic perspective, birthright may help to strengthen a sense of belonging that does not merely depend on individual choice, of equal entitlements and of long-term responsibilities towards future generations. Whatever interpretation we adopt, birthright citizenship is not supported by an underlying norm of social membership that refers to residence as an empirical indicator.

The empirical puzzle why liberal citizenship principles cannot be explained or justified by a criterion of social membership dissipates once we consider that any claim to membership in an association depends not only on the strength of an individual's relations with members of the association but also on the morally legitimate purposes of the latter. Universities, football clubs, churches and business companies have different purposes and these determine their criteria for admitting members. Unlike societies, democratic polities are purposive associations with a membership structure and admission rules.

Carens, like most liberal theorists, focuses on the first question – does a migrant have a sufficiently strong relation to a state to claim citizenship? – without considering the second one – is a citizenship claim supported by the legitimate purposes of the state as a democratic polity? If preserving the intergenerational continuity of the political community is accepted as a legitimate purpose of liberal democratic states, then we have a much more solid ground than social membership for justifying the combination of birthright attribution, voluntary naturalisation and toleration of dual citizenship that we find in the most liberal immigration states and that Carens wants to defend.

The cantilever argument from internal migration

In chapter 11, after restating his critique that citizenship in the modern world citizenship is equivalent to feudal privilege, Carens presents a second argument for open borders that looks *prima facie* more useful if we want to convince citizens of democratic states why they should support such an agenda. The “cantilever argument” proposes “that treating the freedom of movement across state borders as a human right is a logical extension of the well-established democratic practice of treating freedom of movement within state borders as a human right” (237).

The problem with this analogy is not the extension of scale. I think Carens is right that freedom of movement is a fundamental liberty the restriction of which must be justified (instead of the individual having to justify why she wants to cross a border) and that the interests this liberty protects are the same in internal and international migration. The problem is that Carens ignores the different nature and purposes

of the polities whose borders are crossed in internal and in international migration. Just like admission to membership, a claim to admission to a territorial jurisdiction cannot be solely grounded in individual interests but must also take into account what kind of polity an individual wants to enter.

Apart from a few micro-states, all democratic countries have internal borders that demarcate local or provincial jurisdictions. Before the consolidation and democratization of modern states, municipalities and provinces very often were the only polities with substantive forms of self-government and citizenship. And they protected their citizenship in much the same way as modern states do: by deriving it from birth and naturalisation rather than from residence, and by controlling immigration. Modern states have created homogenous spaces for internal freedom of movement by dismantling the immigration control powers of provinces and municipalities. This did not imply abolishing regional and local citizenships. After all, mayors, city councils or regional governors and legislatures are democratically elected and accountable to their respective citizenry. Yet substate polities have witnessed a radical transformation of their citizenship, which is nowadays essentially based on residence rather than birthright.

If, in the example used by Carens, a New Yorker who travels to Los Angeles to take up residence there does not meet any bureaucratic obstacles (p. 246-252), this is because the states that she crosses and the city where she settles are democratic polities with open borders and residence-based citizenship. There are exceptions and they are significant. If our internal migrant changes her mind when driving through the American South-West and decides to settle in an Indian reserve, she may find herself excluded from a birthright-based polity.

Carens' analogy between internal and international freedom of movement seems thus to imply a second analogy of preconditions and purposes. Since internal free movement depends on depriving substate polities of powers to exclude non-local citizens *for the sake of creating a uniform and equal state citizenship*, the extension of free movement from internal to international migration may require an analogous dismantling of state powers to exclude non-citizens *for the sake of creating a uniform and equal world citizenship*. For Carens, who is deeply committed to democracy and pluralism, this should be a rather troubling implication of the cantilever argument.

Let me conclude by suggesting an alternative strategy for the open borders argument that extends the citizen right of exit and return instead of the human right to free internal movement. The freedom to leave a state territory is also a human right, but liberal states accept more far reaching responsibilities towards their citizens who want to leave or have left: they provide them with passports that allow them to enter other territories. Moreover, they guarantee them the one right that remains universally attached to citizenship: the unconditional right to return. If freedom of movement is as important as Carens claims it is, then it follows that states not only have a duty to protect it as a human right for noncitizens within their territory, but also a *prima facie* duty to enable their own citizens to exercise it across international borders. One way in which they can do so is by tolerating dual citizenship, which creates free movement rights for emigrant citizens who adopt a foreign nationality as well as for naturalized immigrants. The second way is by entering into agreements with other states that will provide their own citizens with admission rights if they accept a reciprocal obligation towards these states to admit these countries' citizens into their own territory. This is what liberal states actually do when negotiating visa waiver agreements. A duty to promote free movement opportunities for citizens suggests that such agreements should be extended to include reciprocal settlement rights.

Of course, such a pathway towards expanding free movement rights is at least initially likely to create additional privileges for the citizens of wealthy and liberal democracies and those immigrants who have

already settled there. Yet it seems to me the only route towards free movement which takes seriously that democratic states, although they owe all residents equal respect and concern, have special responsibilities for their own citizens outside their territory and in relations to other states.

This strategy would be perfectly compatible with a concern for global justice and the rights of other migrants. The principle that liberal states have to be able to justify exclusion from their territory can support two quite distinct claims for citizenship-based free movement as well as for admission based on the loss of effective citizenship (refugees) or basic subsistence (poverty migrants). The latter two are not demands for open borders but for preferential admission that remain premised on a general right to immigration control. The gap between free movement and needs-based admissions claims can be narrowed if we also add a duty of liberal democracies to assist “burdened societies”, and to accept these as potential partners for reciprocity-based free movement once they become reasonably stable democracies.

References

- Carens, Joseph H. . 2005. "The Integration of Immigrants." *Journal of Moral Philosophy* 2 (1):29-46.
- Rubio-Marín, Ruth. 2000. *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States*. Cambridge, UK: Cambridge University Press.
- Song, Sarah. 2012. "The boundary problem in democratic theory: why the demos should be bounded by the state." *International Theory* 4 (1):39-68.